

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-481

**DEPARTMENT OF GAME OF THE STATE OF
WASHINGTON, PETITIONER**

v.

THE PUYALLUP TRIBE

No. 72-5437

RAMONA C. BENNETT, PETITIONER

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON

**ON PETITION AND CROSS-PETITION FOR WRITS OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON**

MEMORANDUM FOR THE PUYALLUP TRIBE

This case concerns the validity of the application to the Puyallup Tribe of Indians of regulations of the State of Washington prohibiting net fishing for steel-head trout. The case was previously before this Court in 1968, at which time this Court affirmed the judgment of the court below remanding the case to the trial court for further findings of fact. 391 U.S. 392.

Essentially, the issues to be decided on remand were whether the Washington regulations prohibiting the taking of steelhead trout by net were reasonably required in the interest of conservation, gave adequate consideration to the rights granted the Tribe by treaty, and did not discriminate against the Indians. On remand, the trial court, after a hearing, dissolved the injunction prohibiting Puyallup Indians from taking fish by net. It held that adequate criminal sanctions were available to prevent such fishing and that in any criminal case the State would have the burden of proving that the regulations in effect at that time were reasonable and necessary for the conservation of fish.

Both plaintiffs and defendants appealed to the Supreme Court of the State of Washington. That court held (Pet. App.) that the regulations prohibiting fishing by net for steelhead trout for the year 1970 were valid as applied to the Puyallup Tribe, that new fishing regulations for the Puyallup Tribe must be made each year supported by facts and data that show the regulation is necessary for the conservation of the species of fish in question, and that the injunction against the Tribe should be reinstated subject to modifications consistent with the opinion of the court.

1. The petition for a writ of certiorari of the Department of Game of the State of Washington argues that the Supreme Court of the State of Washington has erred in requiring the Department of Game even to consider whether different fishing regulations should apply to off reservation fishing by treaty-protected Indians than apply to fishermen in general.

The Department also challenges the decision of the Supreme Court of Washington as inconsistent with an earlier decision of the same court.

That the State, in establishing its fishing laws, must give separate consideration to Indians having off-reservation fishing rights under treaties such as the treaty of Medicine Creek was made clear in this Court's previous decision in this case. *Puyallup Tribe v. Department of Game*, 391 U.S. at 397. The Court, quoting *United States v. Winans*, 198 U.S. 371, held that "to construe the treaty as giving the Indians 'no rights but such as they would have without the treaty' (198 U.S. 380) would be 'an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.'" Accordingly, the court below on remand properly rejected the Department of Game's contrary contention. And, since this Court's previous decision concerning the federal treaty rights involved here is controlling, the State's further contention that the decision below is inconsistent with a prior decision of the same state court is immaterial—and would not, in any event, warrant review by this Court.

2. In No. 72-5437, Ramona C. Bennett seeks a writ of certiorari only in the event that this Court grants the petition for a writ of certiorari of the Department of Game (No. 72-481). The Solicitor General, on behalf of the Puyallup Tribe, has also filed a petition for a writ of certiorari in this case and, for the reasons set forth in that petition, we support the conditional cross-petition of Ramona C. Bennett.

For the reasons set forth above it is respectfully submitted that the petition for a writ of certiorari in No. 72-481 should be denied, but if that petition is granted, the conditional cross-petition of Ramona C. Bennett in No. 72-5437 should also be granted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.